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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 93-234
RM-8289

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
TV Broadcast Stations
(Boca Raton and Lake Worth, Florida

To: Chief, Allocations Branch
Mass Media Bureau

COMMENTS OF SHERJAN BROADCASTING CO., INC.

Sherjan Broadcasting Co., Inc. ("Sherjan") comments herein on the Notice of Proposed Rulemaking ("NPRM") released August 26, 1993 in the above-captioned proceeding. Sherjan is the permittee of low power television station W41BF, Miami, Florida. Sherjan is presently constructing its station and anticipates that it will be placed into operation by the end of this year.

In the NPRM, the Commission proposes to permit Palmetto Broadcasters Associated for Communities, Inc. ("Palmetto"), permittee of unbuilt non-commercial television station WPPB-TV, Channel *63, Boca Raton, Florida, and Hispanic Broadcasting, Inc. ("HBI"), permittee of unbuilt commercial television station WHBI-TV, Channel 67, Lake Worth, Florida, to exchange their channels of operation and their communities of license pursuant to Sections 1.420(h) and (i) of the Commission's rules.^{1/} It also proposes to amend the Table of Television Allotments accordingly.

^{1/} A Joint Petition for Rulemaking was filed by Palmetto and Fouce Amusement Enterprises, Inc. ("Fouce"). According to the Petition, Fouce holds an option to buy HBI's construction permit.

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For the reasons set forth below, such action would be arbitrary and capricious and inconsistent with the Commission's policy on channel exchanges.

I. It Would Be Arbitrary And Capricious For The Commission To Conclude That The Public Interest Would Be Served By The Proposed Exchange Of Channels and Communities of License.

A. Palmetto Cannot Justify Depriving Almost 1,000,000 Viewers Of A Third Or Fourth Noncommercial Service In Order To Bring A Second Noncommercial Service To 10,898 Viewers.

The Commission's rules provide that it may amend the Table of Television Allotments and modify television licenses to specify an intraband channel exchange between commercial and noncommercial licenses or permittees where the stations serve substantially the same market and the Commission finds that the action will "promote the public interest, convenience, and necessity." 47 C.F.R. § 1.420(h). In its Report and Order establishing its policy for such intraband exchanges, the Commission stated:

In light of public television's unique service, the Commission agrees that a significant factor in its public interest determination will be the extent to which a noncommercial channel exchange proposal affects a station's ability to continue to serve the viewing public.

Intraband Television Channel Exchanges, 59 RR 2d 1455, 1464a (1986), recon. denied, 3 FCC Rcd 2517 (1988).

The Commission cannot make the public interest determination required to approve the intraband channel exchange proposed by the petitioners on the present record. According to the petitioners, Palmetto's station WPPB-TV would provide Grade B

noncommercial educational television service to 3,796,413 viewers from its presently authorized transmitter site. See Joint Petition for Rulemaking, Engineering Statement at ¶ 15; NPRM at ¶ 4. The Grade B contour of the facilities that Palmetto proposes to operate on Channel *67, Lake Worth, would serve only 2,861,909 people. Id. at ¶ 16. Thus, grant of the petition would deprive almost 1,000,000 people in South Florida of presently authorized noncommercial service.

The petitioners attempt to rationalize depriving almost 1,000,000 people of an additional noncommercial service on the grounds that the proposed channel exchange would bring a second noncommercial service to 10,898 persons in South Florida, whereas the presently authorized service would provide only a third or fourth noncommercial service to the 3.8 million people who reside within the authorized Grade B contour.^{2/} NPRM, ¶ 5. Sherjan submits that it would be arbitrary and capricious for the Commission to conclude that it would serve the public interest to bring a second noncommercial service to 10,898 additional people at a cost of depriving almost 1,000,000 people of an authorized third or fourth noncommercial service. This would truly be a case of the tail wagging the dog. The number of people who would gain an additional second service here is only 1% of the people

^{2/} Petitioners assert that the presently proposed facilities "would bring a fourth service to the vast majority (2,991,034) of individuals within the Grade B contour." Petition at 5. Although the petition states only that the proposed service would be a fourth service to a majority of the remaining viewers without the Grade B contour, the rest of the 3.8 million viewers would, presumably, receive a third noncommercial service.

who would lose a third or fourth noncommercial service. It is demonstrably not in the public interest to permit the exchange of channels and communities of license where 100 times more people would lose a third or fourth noncommercial service than would gain a second noncommercial service.^{3/}

In this case, the loss of service to almost 1,000,000 people is a particularly compelling reason to reject the proposed channel/community swap because WPPB's proposed noncommercial service is not merely duplicative of the existing two or three noncommercial services within its current Grade B contour. The Joint Petition for Rulemaking states that "Palmetto intends to utilize its proposed new channel assignment to deliver public television programming for senior citizens, a much-needed service in an area comprised largely of retired persons." Joint Petition for Rulemaking, at 2. No other noncommercial station in the Boca Raton area provides such a service. Thus, it is not accurate to view WPPB's service as merely a duplicative third or fourth noncommercial service. It is a specialized noncommercial service that is not otherwise available to the 1,000,000 people who would lose service from Channel *63 in Boca Raton if the petition is granted.

^{3/} In contrast, in the Clermont-Cocoa, Florida case, see note 6 infra, so heavily relied on by petitioners, the channel exchange resulted in the provision of first noncommercial service to 18,341 people, first or second noncommercial service to 99,441 people, and an increase in the population within the noncommercial station's Grade B contour from 165,181 people to 1,014,972 people -- an increase of over 600%. See Clermont-Cocoa, Florida, 4 FCC Rcd at 8320.

Moreover, since Palmetto is proposing to move its transmitter site to the North, most of those who are losing noncommercial service from Station *63 live in the direction of Miami, where a great number of viewers are senior citizens to whom WPPB's proposed service is undoubtedly of interest. Indeed, as Palmetto itself asserts in its petition, it plans to deliver "a much-needed service in an area comprised largely of retired persons." Joint Petition at 2. Thus, the loss of this noncommercial service to almost 1,000,000 viewers has particularly weighty public interest significance that the Commission cannot ignore in making its public interest determination.

B. Palmetto Cannot Justify Depriving Its Community Of License Of Noncommercial Service On The Grounds That It Lacks The Financial Resources To Construct And Operate Its Station, Contrary To Its Previous Certification To The Commission.

The only other public interest benefit of the proposal cited by Palmetto is that it will use the funds that Fouce will pay to it upon consummation of the exchange to build and operate its station. Joint Petition, at 4-6. Palmetto asserts that without those funds, it will be "financially unable to place a station serving Boca Raton on the air." Id. at 4. This is a puzzling argument. Noncommercial applicants for television licenses are required to certify in their applications that they are financially qualified to construct and operate their proposed

facilities. See FCC Form 340, Section III.^{4/} Having so certified and obtained a construction permit on Channel *63, Boca Raton, on the strength of such certification, Palmetto cannot now justify depriving the community to which that channel is allocated of noncommercial service on the grounds that Palmetto lacks the financial resources to construct and operate the station unless it cashes in on the value of its authorization.

In short, the petitioners have failed to make a showing adequate to sustain a finding by the Commission that the public interest would be served by grant of their proposal.

II. Fouce Would Not Serve "Substantially The Same Market" With Its Commercial Station Operating On Channel 63, Boca Raton, As Palmetto Would Serve With Its Noncommercial Station On Channel *63, Boca Raton.

As noted above, Section 1.420(h) of the Commission's rules provides that the Commission may permit channel exchanges where, inter alia, the stations in question "serve substantially the same market." 47 C.F.R. § 1.420(h). The exchange proposed here does not satisfy that requirement.

Petitioners argue that the channels to be exchanged by them serve substantially the same market because Boca Raton and Lake Worth are approximately 20 miles apart and are in the same Metropolitan Statistical Area. See Joint Petition at 4. What petitioners neglect to take into account, however, is that Fouce proposes to move the transmitter site for its proposed station on

^{4/} Where the noncommercial applicant's financial qualifications are contingent on a future grant or appropriation, the Commission will not grant its application for a construction permit until the necessary funds are committed or appropriated. See id.

channel 63 to the Miami antenna farm near Hollywood, Florida. See Joint Petition, Engineering Statement at ¶ 12.^{5/} Whereas Boca Raton and Lake Worth are both within the West Palm Beach-Fort Pierce-Vero Beach Arbitron Area of Dominant Influence ("ADI"), the transmitter site proposed by Fouce is within the Miami ADI.^{6/}

For purposes of determining whether stations serve "substantially the same market" within the meaning of Section 1.420(h), the Arbitron ADI is certainly a more relevant geographic area than the Office of Management and Budget's Metropolitan Statistical Area.^{7/} Moreover, it is appropriate to consider where the petitioners will actually locate their facilities rather than simply the communities to which their channels are nominally assigned.^{8/} Indeed, petitioners

^{5/} Fouce has a record of moving television stations into large adjacent markets. See Amendment of Section 76.51 to Include Riverside, California in the Los Angeles-San Bernadino-Corona-Fontana, California Television Market, 8 FCC Rcd 4783 (1993), in which Fouce, the licensee of a commercial television station in Riverside, California, asked the Commission to amend Section 76.51 of its rules to include Riverside in the Los Angeles television market.

^{6/} See Broadcasting & Cable Yearbook 1993, pp. C-177, C-206.

^{7/} The ADI is a geographic market designation that defines each television market based on measured viewing patterns. Each ADI consists of all counties in which the home market stations receive a preponderance of viewing. See Broadcasting & Cable Yearbook 1993, p. C-133. In contrast, Metropolitan Statistical Areas are not defined based on television viewing patterns.

^{8/} See Clermont-Cocoa, Florida, 4 FCC Rcd 8320, 8322-23 (1989), recon. denied 5 FCC Rcd 6566 (1990), aff'd sub nom Rainbow Broadcasting Co. v. FCC, 949 F.2d 405 (D.C. Cir. 1991) ("Clermont-Cocoa").

themselves assert that the Commission should "consider in its analysis of the public benefits the specific sites used for reference coordinates in the Engineering Statement or sites with substantially similar coverage." Joint Petition at 4 n.2.

Sherjan concurs with that suggestion.

Petitioners' reliance on the Clermont-Cocoa case^{9/} is misplaced. The Clermont and Cocoa communities are both located in the Orlando-Daytona Beach-Melborne ADI, which is designated as a single television market in Section 76.51 of the Commission's rules.^{10/} The critical issue is whether the stations will serve substantially the same market, not the mileage between the two stations. See 47 C.F.R. § 1.420(h).

Accordingly, the Commission cannot amend the Table of Allotments and modify petitioners' construction permits to specify the exchange of channels and communities of license because the commercial station would not serve substantially the same market as the presently authorized noncommercial station in Boca Raton.

^{9/} See id.


^{10/} See Broadcasting & Cable Yearbook 1993, p. C-184; 47 CFR § 76.51; Clermont-Cocoa, 4 FCC Rcd at 8321. Moreover, it should be noted that in the Clermont-Cocoa case, the petitioner proposed only to exchange their channels, not their communities of license.

CONCLUSION

For the foregoing reasons, the Commission should deny the petition.

Respectfully submitted,


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Dated: October 18, 1993

Certificate of Service

I, Paula J. Lust, hereby certify that I served a true copy of the foregoing Comments of Sherjan Broadcasting Co., Inc. by mailing same, first class, postage prepaid, this 18th day of October, 1993, to:

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